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In the
Supreme Court of the United States

October Term, 1945

No. [redacted] 34

GEORGE HARRIS, PETITIONER,

VERSUS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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DECEMBER, 1945.

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PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of George Harris, petitioner, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

"In execution of two warrants for the arrest of petitioner one duly issued upon a criminal complaint alleging viola-

tion of the Mail Fraud Statute (18 U.S.C.A. 338) and the other for violation of the National Stolen Property Act (18 U.S.C.A. 413-419)—five special agents of the Federal Bureau of Investigation went to the apartment of petitioner in Oklahoma City, Oklahoma, about 1:30 p. m., where they found appellant, and immediately placed him under arrest. In connection with the arrest, and for the declared purpose of 'looking for two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company * * *' and for 'any means that might have been used to commit these two crimes, such as burglary tools, pens or anything that could be used in a confidence game of this type,' the agents proceeded to make a 'thorough search' of appellant's apartment consisting of a living room, bedroom, kitchen and bathroom" (Opinion, R. 145-146).

"After searching for about five hours, one of the agents discovered a sealed envelope in a bureau drawer in the bedroom under some underclothes, upon which was written, 'George Harris, personal papers.' This envelope was torn open and inside it was a smaller one which contained eight Notice of Classification cards, DSS Form 57, and eleven Registration Certificates, DSS Form 2, stamped 'Local Board No. 7, Oklahoma County, 84, 825 Cotton Exchange Building, Oklahoma City, Oklahoma.' * * * Petitioner was later charged by an indictment in the District Court for the Western District of Oklahoma containing nineteen counts for offenses growing out of his alleged unlawful possession of these cards

and certificates. After timely motions to quash, suppress and dismiss, a jury having been waived, the case was tried to the Court. The cards and certificates were offered and admitted in evidence over petitioner's objection, and based upon this evidence, the Court found petitioner guilty of various counts contained in the indictment, and imposed concurrent sentences of five years on each of sixteen counts" (Opinion, R. 146).

"Admittedly the officers had no search warrant describing the premises searched or the articles seized, and the only asserted authority for the search and seizure was as an incident to and contemporaneously with petitioner's lawful arrest within the premises searched" (Opinion, R. 146).

B.

Basis of Jurisdiction of This Court

Petitioner appealed from the judgment and sentence of the District Court of the United States for the Western District of Oklahoma to the Circuit Court of Appeals for the Tenth Circuit, and that court rendered judgment affirming the District Court on October 26, 1945 (R. 152).

The opinion of the Circuit Court of Appeals (R. 145) is reported in — Fed.(2d) —.

Petition for rehearing was filed by petitioner (R. 153), and was denied by the Circuit Court of Appeals on November 28, 1945 (R. 167).

This petition for writ of *certiorari* is filed within thirty (30) days after the entry of the judgment of the Circuit Court

of Appeals denying petition for rehearing, as required by Rule 11 of the Rules of Criminal Procedure of this Court promulgated May 7, 1934.

Jurisdiction is conferred upon this Court by Title 28, Sec. 347(a), U.S.C.A. (Jud. Code, Sec. 240, as amended) to require by *certiorari* that said cause be certified to this Court by the Circuit Court of Appeals for the Tenth Circuit for determination by this Court.

C.

Questions Presented

1. Whether as an incident to a lawful arrest an unlimited, ransacking search may be made of the home of the person arrested for the purpose of discovering and seizing evidences of guilt of crime.

2. Whether when a man is legally arrested the officer may search for and seize everything in his control which it is unlawful for him to have, or may only search for and seize whatever is found upon his person and in his immediate control.

3. Whether so-called good faith of officers in making a search of premises incident to a lawful arrest may be substituted for the probable cause necessary in order to make a search reasonable.

4. Whether evidence seized upon a search of premises claimed to be incident to a lawful arrest therein may be used against the person arrested upon his prosecution for an offense other than that for which he was then arrested, which

offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search.

D.

Reasons Relied on for the Allowance of the Writ

1. The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decisions of this Court, particularly the decisions in *Boyd* v. *United States*, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. 524, holding a search for a man's private papers to be used as evidence against him to be unreasonable and in violation of the Fourth and Fifth Amendments to the Constitution of the United States; in *Weeks* v. *United States*, 232 U.S. 383, 58 L. ed. 652, 34 Sup. Ct. 341, holding envelopes found in the drawer of a chiffonier upon a search for additional testimony to support the charge against the accused could not be used against him; in *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385, 64 L. ed. 319, 40 Sup. Ct. 182, holding papers seized upon a clean sweep of accused's office could not be made the basis of a new indictment based upon the knowledge thus obtained; in *Gouled* v. *United States*, 255 U.S. 298, 65 L. ed. 647, 41 Sup. Ct. 261, holding that even a search warrant may not be used as a means of gaining access to a man's house or papers for the purpose of making search to secure evidence to be used against him in a criminal proceeding; and in *Byars* v. *United States*, 273 U.S. 28, 71 L. ed. 520, 47 Sup. Ct. 248, holding that a search prosecuted in violation of the Constitution is

not made lawful by what it brings to light; and in *Marron* v. *United States*, 275 U.S. 192, 72 L. ed. 231, 48 Sup. Ct. 74, holding that general searches violate fundamental rights and that the Constitutional requirement prevents the seizure of one thing under a warrant describing another; and in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, 75 L. ed. 374, holding an unlimited search and ransacking of desk, safe, filing cases and other parts of an office to be a lawless invasion and a general exploratory search in the hope that evidence of crime might be found, and therefore unreasonable; and in *United States* v. *Lefkowitz*, 285 U.S. 452, 76 L. ed. 877, holding a search of desks, cabinet and baskets in defendant's office and the seizure of books, papers and other articles taken from them, as an incident of a lawful arrest under a warrant, and which were wanted solely for use as evidence of crime, to be unreasonable and in violation of defendant's Constitutional rights; and in *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. 266, holding a motion to suppress as evidence contraband and illicitly distilled blockade whiskey seized upon an illegal search of a private home should have been sustained.

It is also in conflict with the decision of this Court in *Director General* v. *Kastenbaum*, 263 U.S. 25, 68 L. ed. 146, 44 Sup. Ct. 52, holding that good faith is not enough to constitute probable cause.

2. The decision of the Circuit Court of Appeals for the Tenth Circuit is also in conflict with the decisions of the Circuit Courts of Appeals for the Second, Fourth, Fifth,

Sixth, Seventh and Ninth Circuits; and particularly the decisions in *Veeder* v. *United States* (C.C.A. 7th), 252 Fed. 414, holding papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure even under a search warrant; in *Wakkuri* v. *United States* (C.C.A. 6th), 67 Fed. (2d) 844, holding any search of a private dwelling without a search warrant is at least *prima facie* unreasonable, and that that which might not be done with the only kind of search warrant that could be obtained—an invalid one—should not be permitted without any warrant at all; in *Papain* v. *United States* (C.C.A. 9th), 84 Fed.(2d) 160, holding that a lawful arrest does not enlarge the right to search a dwelling house, but merely serves the function of a search warrant; in *United States* v. *Thompson* (C.C.A. 7th), 113 Fed.(2d) 643, 129 A.L.R. 1291, holding the right to search without a search warrant in connection with an arrest is no greater than when the search is made pursuant to a search warrant; in *United States* v. *Kirchenblatt* (C.C.A. 2d), 16 Fed.(2d) 202, holding the right to search the premises of one lawfully arrested thereon does not extend to indiscriminate seizure of incriminating documents beyond those which are part of the forbidden act for which he is arrested; in *United States* v. *Poller* (C.C.A. 2d), 43 Fed.(2d) 911, holding that the power of officers making an arrest to search for and seize papers of the person arrested is limited to those used to commit or carry on the offense for which the arrest is made; in *Cofer* v. *United States* (C.C.A. 5th), 37 Fed.(2d) 577, holding shells seized in

execution of search warrant for intoxicating liquors could not be used in evidence in prosecution for conspiracy to deter witness by force, although shells resembled those found in place where witness was murdered; in *Honeycutt* v. *United States* (C.C.A. 4th), 277 Fed. 929, holding stolen goods seized upon search warrants held to be invalid could not be used in evidence in prosecution for buying, receiving and having in possession articles stolen from an interstate shipment; in *Lawson* v. *United States* (C.C.A. Ill.), 9 Fed.(2d) 746, holding to the same effect; and in *Takahashi* v. *United States* (C.C.A. 9th), 143 Fed.(2d) 118, holding that where a search is justifiable and legal for the purpose of obtaining the instrumentalities of the commission of a particular crime, the seizure of evidence that an entirely different crime may have been committed is not justified by the circumscribed authority for the legal search.

3. The question involved in this case as to whether evidence seized upon a search of premises claimed to be incident to a lawful arrest therein may be used against the person arrested upon his prosecution for an offense other than that for which he was then arrested, which offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search, is one of Federal law, under the Constitution of the United States and Amendments thereto, which has not been, but should be, settled by this Court.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 3105, George Harris, Appellant, v. United States of America, Appellee;" and that said judgment of the said United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

GEORGE HARRIS,
Petitioner;

HERBERT K. HYDE,
Attorney for Petitioner.

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VERSUS

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions

No opinion was rendered by the United States District Court. The judgment was by Stephen S. Chandler, Jr., United States District Judge (R. 36-37).

The opinion of the Circuit Court of Appeals for the Tenth Circuit (Murrah, Circuit Judge, and Rice and Savage, District Judges; written by Judge Murrah) was rendered October 26, 1945, and is found beginning at Page 145 of the record, and is reported in — Fed.(2d) —.

II.

Jurisdiction

Jurisdiction of this Court to grant *certiorari* is invoked under Title 28, Sec. 347(a) U.S.C.A. (Jud. Code, Sec. 240, as amended), and is shown in the Petition at Page 4.

III.

Statement of Case

Five special agents of the Federal Bureau of Investigation went to petitioner's home in Oklahoma City and arrested him upon two warrants (R. 62, 65), one of which (R. 24) charged petitioner with having sent a letter through the mails in connection with the execution of a scheme to defraud by negotiation and cashing of a certain false, forged and fictitious check for the sum of $25,000, drawn on the Mudge Oil Company; and the other (R. 27) charging petitioner with having caused the same check to be transported in interstate commerce. They immediately handcuffed petitioner, and from 1:30 to 6:30 p. m. made "a thorough examination of the premises" consisting of four rooms, lifting up the mattresses and carpets, and "the search was as thorough as we could make it" (R. 70). One of the officers testified (R. 65) that "We were looking for two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company," and (R. 66) that "We were searching for any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a con-

fidence game of this type." He further testified that he was searching in the home of petitioner for the same things for which he later obtained a search warrant to search petitioner's automobile (R. 68), and in his application for this search warrant he stated he wanted to search for "monies unlawfully obtained, checks of the Mudge Oil Company and other forms of checks and other paraphernalia and instrumentalities used in the perpetration of what is commonly known as 'confidence game,' or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books * * *." Another of the officers testified (R. 77), that "I was searching for anything which may have been the means through perpetrating any of the charges alleged in the complaints," and (R. 78), "It is my understanding that we were searching for two blank checks and also searching for writing materials, burglar tools or anything of that nature which may have been used in perpetrating the crimes alleged, charged."

These statements of the officers show conclusively that they were not actually looking for the means by which the crimes alleged had been committed, but that they were looking merely for evidence of the commission of those or some other crimes.

The officer who found the cards and certificates involved testified that he found them (R. 77) "in the second drawer in his bureau. * * * The cards were inside a small envelope, inside of the outside envelope, and it was sealed there;" that there were also some green cards in the small envelope; that

the envelope was found at the bottom under some underclothes (R. 78); that the drawer was closed, and he opened it; that they were hidden from his view until he removed the clothing; and that he broke the seal to the outside envelope (R. 86), on which was written, in the handwriting of petitioner, the words, "George Harris, Personal Papers" (R. 85 and 86, Exhibits 20 and 21, R. 135).

IV.

Specification of Errors

The evidence upon which the indictment, and each and every count thereof, was based, and upon which the judgment of conviction on each and every count was based, was obtained by an unreasonable and unlawful search and seizure in violation of the rights of the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States; by reason whereof, the trial court erred in overruling the motion of petitioner to suppress evidence (R. 18), his motion to quash the indictment (R. 33), his demurrer to the indictment (R. 33), and erred in admitting the evidence so seized.

V.

Summary of Argument

POINT A. The unlimited, ransacking search of petitioner's home as an incident to his lawful arrest for the purpose of discovering and seizing evidence of his guilt of crime, was unreasonable, and in violation of his rights under the Fourth

and Fifth Amendments to the Constitution of the United States.

POINT B. Upon lawful arrest of a man, the officer may not search for and seize everything in his control which it is unlawful for him to have, but only whatever is found upon his person and in his immediate control.

POINT C. The officers had no probable cause for making such a search of petitioner's home, and their so-called good faith cannot be substituted therefor so as to make their search reasonable.

POINT D. The evidence seized upon such search cannot be used as evidence against petitioner upon his prosecution for an alleged offense other than that for which he was then arrested, which offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search.

VI.

ARGUMENT

Point A

The unlimited, ransacking search of petitioner's home as an incident to his lawful arrest for the purpose of discovering and seizing evidence of his guilt of crime, was unreasonable, and in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

And the Fifth Amendment provides:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The intimate relation between these Amendments was pointed out by this Court in *Boyd* v. *United States*, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. 524, holding that they were both violated by the seizure of a man's private papers for the purpose of using them in evidence against him in a criminal case; and the principles laid down in that case have been followed without variance by this Court whenever the question of searches or seizures has been brought before it.

The principles in that and later cases by this Court are likewise recognized as controlling in the opinion by the Circuit Court of Appeals in this case, when it says (R. 147):

"We start then with the proposition that general exploratory searches for the purpose of uncovering evidence of crime, or for obtaining information, either with or without a search warrant is unreasonable and therefore within the Constitutional ban. *Boyd* v. *United States*, *supra*; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Gouled* v. *United States*, 225 U.S. 298; *Amos* v. *United States*, 255 U.S. 313."

And when it says further (R. 148) that:

"A clean sweep of all the papers and documents found on the premises where the arrest was made was not reasonably incident to the lawful arrest, as all general

exploratory searches in the hope that evidence of crime might be found, are unreasonable. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Go-Bart Importing Company* v. *United States*, 282 U.S. 344; *United States* v. *Lefkowitz*, 285 U.S. 452."

But the Court seeks to evade those principles when it announces that its reason for holding the search and seizure in this case to be reasonable, is (R. 149):

"* * * The officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest."

Yet if the arrest of petitioner was the avowed object, purpose and intent of the officers in entering his home, and none other, then they had completed their mission when they seized the person and the body of petitioner and had him handcuffed.

It is significant that petitioner has never been indicted for either of the alleged offenses for which he was arrested. This being so, is it unreasonable for us to ask this Court to consider the thorough search which was made as a basis for our argument that at the time of the arrest the officers were searching in every nook and corner, making a "general and exploratory search," with the hope and purpose in mind that they might be able to find something in connection with an alleged violation of law, if not the crime for which he was arrested, then some other crime, anything, in order to convict this petitioner of some crime?

If the avowed object and purpose of the officers was merely to execute a valid warrant of arrest, then we ask why

the officers detailed a special squad to guard the petitioner while two of them left in the middle of the afternoon and went back to the office of the United States Commissioner and there procured a search warrant to search his automobile, after they had completely ransacked his home? And why was it that that search warrant was procured upon an affidavit made merely "upon information and belief"? That affidavit (R. 28-30), made by Agent Melvin, the leader of the squad of officers who made this search, states that "he has good cause to believe, and does believe that George Harris * * * has in his possession * * * checks of the Mudge Oil Company and other forms of checks, etc.," without stating one single fact upon which he based that belief. Such an affidavit this Court has held to be bad if tested by the Fourth Amendment. *Byars* v. *United States*, 273 U.S. 28, 71 L. ed. 520, 47 Sup. Ct. 248.

In *Gouled* v. *United States*, 255 U.S. 298, 65 L. ed. 647, 41 Sup. Ct. 261, this Court held that, as a result of the *Boyd* and *Weeks* cases, even a search warrant—

> "* * * may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceedings,"

and further holding, of the papers for which the search was made in that case, similar to the papers for which these officers were searching in this case, that:

> "The government could desire its possession only to use it as evidence against the accused, and to search for and seize it for such purpose was unlawful."

The facts in *Go-Bart Importing Co.* v. *United States*, *supra*, were very similar to those in this case. There a prohibition agent, with a warrant for the arrest of defendants, went to the offices of the company, arrested two of the defendants, and by threat of force compelled one of them to open a desk and safe, searched them and took papers from them, and searched other parts of the office and took other papers; of which this Court said:

> "It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found."

Another similar case is *United States* v. *Lefkowitz*, 285 U.S. 452, 76 L. ed. 877, in which this Court reviews many of the earlier cases starting with the *Boyd* case, *supra*. There, four prohibition agents, with a warrant of arrest for defendant, but without a search warrant, went to his office and arrested him, and thereupon searched and took from the person of defendant various papers, opened all the drawers of both desks in the room and also a towel cabinet, examined their contents, and took therefrom and carried away books, papers and other articles; of which this Court said:

> "* * * Save as given by that warrant (of arrest) and as lawfully incident to its execution, the officers had no authority over respondent or anything in the room. * * * (They) assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense * * * Their conduct was unrestrained."

And further held that the authority of officers to search one's house contemporaneously with his lawful arrest therein upon a valid warrant of arrest—

> "* * * certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."

The facts do not justify any inference that these officers had any probable cause to search petitioner's home for those things for which they said they were searching.

Would any member of this Court have felt justified in issuing to these officers a search warrant to search his home based upon the suspicions, beliefs and surmises which they had? If they had told a member of this Court that they "believed" that petitioner might have had in his home "two $10,000 cancelled checks of the Mudge Oil Company," which might afford evidence that he was connected with sending this alleged $25,000 forged check through the mails and in interstate commerce, without telling you any more facts to justify that belief than they told the United States Commissioner in the affidavit for search warrant (R. 28-30) to search his automobile for the same purpose, would a search warrant have been given to them for that purpose? Manifestly not.

The search warrant for the automobile was void on its face. It is to be supposed that if they had applied for a search

warrant to search petitioner's home at the same time they secured the warrants for his arrest, it would likewise have been bad on its face. How much more power, then, did these agents have as a claimed incident to the arrest?

In *Wakkuri* v. *United States* (C.C.A. 6th), 67 Fed.(2d) 844, it is said:

> "Any search of a private dwelling without a search warrant is at least *prima facie* unreasonable. *Agnello* v. *U. S.*, 269 U.S. 20, 70 L. ed. 145, 46 Sup. Ct. 4. * * * That which might not be done with the only kind of search warrant that could be obtained—an invalid one—should not be permitted without any warrant at all."

And, in *Papain* v. *United States*, (C.C.A. 9th), 84 Fed. (2d) 160:

> "That a lawful arrest is made does not enlarge the right to search a dwelling house or to seize articles therein, as the arrest merely serves the function of a search warrant."

And, in *United States* v. *Thompson* (C.C.A. 7th), 113 Fed.(2d) 643, 129 A.L.R. 1291:

> "The right to search without a search warrant in connection with an arrest is no greater than when the search is made pursuant to a search warrant."

Point B

Upon lawful arrest of a man, the officer may not search for and seize every thing in his control which it is unlawful for him to have, but only whatever is found upon his person and in his immediate control.

The Circuit Court of Appeals in its opinion (R. 147-148) asserts:

> "* * * that when a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense, may be seized and held as evidence in a prosecution against him."

An examination of the cases cited in support of this proposition does not seem to support the conclusion reached thereunder in this case when applied to the facts, but shows that the proposition is stated too broadly.

It is true that this statement just quoted is made in the same language in *Carroll* v. *United States*, 267 U.S. 132, 69 L. ed. 543, 39 A. L. R. 790; but there the Court did not have under consideration a case in which it was claimed there had first been a legal arrest, and therefore the Court seems to have unfortunately omitted to include the word "immediate" in the phrase used, "in his control."

We think the Court is not justified in using the *Carroll* case as authority for the search in this case, in any event; for this Court very emphatically calls attention in that case to the fact that a very different rule must necessarily apply in the case of a moving vehicle which can be quickly removed before a search warrant could be procured, and the case of a search of a store, dwelling house or other structure.

As authority for the statement in the *Carroll* case, *supra*, this Court in that case, as does the Circuit Court in its opinion in this case, cited the case of *Weeks* v. *United States*, 232 U.S. 383, 58 L. ed. 652, 34 Sup. Ct. 341; but the *Weeks* case does not go so far, but merely recognizes the right "to search the person of the accused when legally arrested," and refuses

to sanction the search of one place under a lawful arrest at another. This is likewise true of *Agnello* v. *United States*, 269 U.S. 20, 70 L. ed. 145.

The *Marron* case can furnish no justification for the search here made. For, as is suggested in the *Go-Bart* case, in commenting on the *Marron* case, these officers in searching the home of George Harris did not "see conspiracy being committed;" George Harris was not "committing crime in their presence when arrested:" but, contrary to the situation in the *Marron* case in which the "things were *visible* and accessible and in the offender's *immediate* custody," the things here were discovered only by a "general search and rummaging" of Harris' home.

In the *Lindenfeld* case (C.C.A. 2d), 142 Fed.(2d) 829, the things seized were cards containing patient's records, within reach of his desk, upon the lawful arrest of a physician in his office for violation of the narcotics laws; and the Court there comments on the fact that "there was no exhaustive and minute combing of the premises as in the *Go-Bart* and *Lefkowitz* cases," but, being within easy reach of his desk in his office where he conducted his unlawful enterprise, they were in his "*immediate* possession and control."

In *Matthews* v. *Correa*, 135 Fed. (2d) 534, upon petitioner being arrested in her home for concealing property from her trustee in bankruptcy, a search was made and certain articles were found and seized, which the Court says were "the very things withheld." The Court calls attention to the fact that in *U. S.* v. *Poller* (2d Cr.), 43 Fed. (2d) 911 (which this Court

also cites), it was suggested that under the then decisions the limitations were only "upon the fruits to be gathered" and that these would "tend to limit the quest itself." This is apparently about the same thing this Court is now suggesting. However, in the cited case, the Court says:

> "Possibly, however, the law now goes further and *limits the manner of search*. At any rate, the *Lefkowitz* and *Go-Bart* cases emphasized that in the *Marron* case the articles seized were *visible* and accessible and in the offender's *immediate* custody."

In *U. S.* v. *Tot* (C.C.A. 2d), 131 Fed.(2d) 261, the thing taken upon an arrest of defendant was a *gun*. Not only did Tot tell the officers that he had a gun, but told them where it was, and its taking was "practically a contemporaneous transaction" with the arrest. And it was held properly seized only by reason of the fact that it came within the well established exception of being "a weapon which might be used to effect an escape."

The *Poller* case, *supra*, not only does not support the decision herein, but holds that the things which may be seized upon a lawful arrest are—

> "* * * limited to those used to commit or carry on the offense for which the arrest is made."

The decision in *U. S.* v. *Welsh* (D.C., N.Y.), 247 Fed. 239, plainly cannot stand, in view of the *Byars* case. For Welsh was arrested without a warrant, and there is no justification shown for the arrest in the first instance; and when the Court says that—

"anyone could arrest the person carrying it, who was thus committing a felony *in his presence*. To be sure, the man making the arrest *would not know that a felony was being committed.* * * * But in this case it appears * * * that the *suspicions were well founded,*"

it, in effect, says that:

"a search prosecuted in violation of the Constitution *is* made lawful by what it brings to light."

And this the *Byars* case says cannot be true.

The same applies to the case of *Welsh* v. *U. S.* (C.C.A. 2d), 267 Fed. 819, involving the same arrest and search.

Neither does the case of *Colyer* v. *Skeffington* (D.C., Mass.), 265 Fed. 17, support the decision here. In that case the Court, in a *habeas corpus* hearing for twenty aliens held for deportation as being members of the Communist party, approves the principles of the *Weeks* and *Silverthorne* cases, and comments on the fact that "there were probably no search warrants and that none could have been legally issued."

In *U. S.* v. *Murphy* (D.C., N.Y.), 264 Fed. 842, Murphy was arrested for being drunk; and whiskey was seized "from his person." The case can have no application here.

In *Flagg* v. *U. S.*, 233 Fed. 481, cited in the *Colyer* case, *supra*, and cited by this Court, defendant was arrested without a warrant and without a search warrant certain books were seized and made the basis for his later arrest by Federal officers and his conviction for using the mails to defraud. The case was reversed because of the *unlawful* seizure.

In *U. S.* v. *Hart*, 214 Fed. 655, the things involved were *voluntarily* delivered by Hart to the U. S. Attorney, and the

Court says that, "on the statement of Hart himself, there has been no search and no seizure."

In *U. S.* v. *Mills* (D.C., N.Y.), 185 Fed. 318, the seizure of documents concerning another similar offense to that on which defendant was lawfully arrested, was held improper.

The decision in *U. S.* v. *Wilson* (D.C., N.Y.), 163 Fed. 338, which involved things taken from a trunk afterwards opened with a key taken *from the person* of defendant when arrested, turns upon the meaning of the terms "compulsory discovery" and "seizure;" which the Court holds to—

> "refer to more than the exercise of compulsion upon the defendant himself, either during the trial, or while he is under arrest, to compel him to produce, or to furnish information as to, property and papers which are wanted as evidence."

In refusing to return the seized items before the trial, the Court reserved to the defendant the right to object to their introduction in evidence at the trial on Constitutional grounds.

We therefore submit that the principle can only be correctly stated by changing it to read—

> "that when a man is legally arrested for an offense, whatever is found upon his person or in his *immediate* control which is unlawful for him to have and which may be used to prove the offense for which he is then arrested, may be seized and held as evidence in a prosecution against him for that offense."

Point C

The officers had no probable cause for making such a search of petitioner's home, and their so-called good faith

cannot be substituted therefor so as to make their search reasonable.

The Circuit Court of Appeals in its opinion attempts to differentiate and justify the search made in this case from those made in the *Lefkowitz*, *Go-Bart* and other cases cited, *supra*, on the ground of "good faith." It says (R. 150):

> "The authority (to search) must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. The restraint can best be imposed by an inquiry into the *bona fides* of the declared purposes of the search."

Yet that same court, in its opinion in *Pearson* v. *U. S.*, 150 Fed.(2d) 219, concurred in by the writer of the opinion in the present case, cited and quoted from *Director General* v. *Kastenbaum*, 263 U.S. 25, 68 L. ed. 146, 44 Sup. Ct. 52, on the question of probable cause and good faith, the language of which latter case may be paraphrased as follows:

> "But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the agent, which, in the judgment of the court, would make his faith reasonable. * * * The burden is on the (Government) to establish probable cause for the (search). The want of probable cause, certainly in the absence of proof of guilt or conviction of the (defendant), is measured by the state of the (officer's) knowledge, not by his intent. It means the absence of probable cause known to the (officer) when he instituted the (search). But the standard applied to (the officer's) consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did."

Would this Court say that the facts and knowledge which these officers disclosed to the United States Commissioner in obtaining a search warrant to search petitioner's automobile following their search of his home and their failure to find any evidences of guilt of crime, constituted probable cause, or even showed them to be in good faith? They say to this Court: "Our investigation established two $10,000 cancelled checks had been stolen from the offices of the Mudge Oil Company; we are not going to tell you the facts, but that is what we thought; therefore, without more, we made this search in good faith."

In *Veeder* v. *United States* (C.C.A. 7th), 252 Fed. 414, it is said:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts, * * *. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser.
>
> "No search warrant should be broader than the justifying basis of facts. * * *"

Point D

The evidence seized upon such search cannot be used as evidence against petitioner upon his prosecution for an alleged offense other than that for which he was then arrested, which offense is wholly unrelated to the offense for which the arrest was made and which was only discovered by reason of the search.

The Circuit Court of Appeals, having already held this search to have been legal, assumes this as a premise in further holding (R. 150 *et seq.*) that the evidence seized may be used to prosecute petitioner for a wholly unrelated crime. It must assume this premise, else it would be immediately confronted with the holding of this Court in *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. 266, in which it was held to be error to overrule a motion to suppress as evidence certain illicitly distilled blockade whiskey seized upon a search which it held to be unlawful in its beginning. It would also be confronted with *Byars* v. *United States*, 273 U.S. 28, 71 L. ed. 520, 47 Sup. Ct. 248, wherein this Court pointed out that:

> "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light."

We do not concede this search to have been legal in any respect. However, assuming that it had been legally begun, we still insist that the seizure was illegal, and that the articles seized could not lawfully be used as evidence against the petitioner.

In *United States* v. *Kirchenblatt* (C.C.A 2d), 16 Fed.(2d) 202, which has been cited and approved by this Court in a number of cases, particularly in the *Go-Bart* case, *supra*, it is said:

> "The right to search the premises of one lawfully arrested thereon for unlawful possession of intoxicating liquor does not extend to the indiscriminate seizure of incriminating documents beyond those which are part of the forbidden act.

"* * * After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate"

And in *United States* v. *Poller* (C.C.A. 2d), 43 Fed.(2d) 911, it was held:

"The power of officers making an arrest to search for and seize papers of the person arrested is limited to those used to commit or carry on the offense for which the arrest is made."

In *Cofer* v. *United States* (C.C.A. 5th), 37 Fed.(2d) 577, the government was held precluded from using evidence of shells found in executing a search warrant for intoxicating liquors, in a prosecution for conspiracy to deter witness by force, although it was claimed the shells resembled those found in place where witness was murdered.

In support of its conclusion on this point, the Circuit Court of Appeals in its opinion cites *Gouled* v. *United States*, 255 U.S. 298, 311, 312; *Matthews* v. *Correa*, 135 Fed.(2d) 534; *Shelton* v. *United States*, 50 Fed.(2d) 405; *United States* v. *Kirchenblatt*, *supra*; *United States* v. *Charles*, 8 Fed.(2d) 302; and *Milan* v. *United States*, 296 Fed. 629. But we assert that they do not uphold the opinion of the Circuit Court in this case.

Referring to the *Gouled* case, *supra*, the fifth question certified and decided read:

"If, in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be

searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?'"

This Court answered that question in the affirmative, but it is submitted that a proper interpretation of that answer does not uphold the use in evidence against petitioner of the articles here seized in this prosecution. The papers in question in that case were seized under two search warrants, the affidavit for the first charging that they "were used as a means of committing a felony, to wit: as a means for the bribery of a certain officer of the United States," and the affidavit for the second charging that they "relate to and have been used in the commission of a felony, to-wit: a conspiracy to defraud the United States." After the papers were seized a joint indictment was returned charging defendants, in the first count, with "being parties to a conspiracy to defraud the United States," and, in the second count, with "having used the mails to promote a scheme to defraud the United States." It is at once evident that the question certified was for the purpose of having determined whether the papers, if the Court held them to have been lawfully seized, could have been used in evidence on the charge of illegal use of the mails, that crime not having been mentioned in the affidavits or search warrants. Bearing in mind, then, that this Court has already held the papers to have been unlawfully seized, let us examine the reasoning used in answering the above question in the affirmative:

"It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid warrant, when thus lawfully obtained by the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence."

The requirements of the Fourth Amendment for a "valid search warrant" are that—

"* * * no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The question assumes, therefore, as does the answer, that the search warrant "particularly described the things to be seized;" that the affidavit for such search warrant showed probable cause that "they" (the things to be seized) had been or were being used to violate some law; and that after the things so "particularly described" had been so lawfully seized, it was found that "they" constituted relevant evidence also as to some other crime which had not been previously charged, either by indictment or in the affidavit for search warrant. This is far from saying that some other

things not so particularly described in the warrant could have been seized and used as the basis for the prosecution for some other crime wholly unrelated to the object of the search.

A recent case from the Circuit Court of Appeals for the Ninth Circuit illustrates this difference: *Takahashi* v. *United States*, 143 Fed.(2d) 118. In that case, which relies on the *Boyd*, *Gouled*, *Silverthorne* and *Lefkowitz* cases, *supra*, for authority, the right of Government agents to search two American-born Japanese for contraband goods which they were apparently attempting to smuggle was upheld; but it was held that this gave them no right to seize, to attempt to use in evidence, private papers tending to show falsification of application for export license or conspiracy to falsify such application; the court saying:

> "It was conceded that there was reasonable ground for the search.
>
> "But the authority to search cannot be confused with the authority to seize. It cannot be confused with the power to use seized articles in evidence. The Fourth Amendment prohibits unreasonable searches and seizures. The distinction has never been more carefully drawn than in the language used by Mr. Justice Miller in the concurring opinion in the case of *Boyd* v. *U. S.*, *supra*. It is there said:
>
> "'The searches meant by the Constitution were such as led to seizures when the search was successful.'
>
> "And again: 'The things here forbidden are two: search and seizure.'
>
> "It may be laid down as a principle that where a search is justifiable and legal for the purposes of obtaining the instrumentalities of the commission of a particular crime, the seizure of evidence that an entirely

different crime may have been committed is not justified by the circumscribed authority for the legal search. Otherwise, a general seizure of documents could be carried out where a valid search warrant could only be issued for limited objectives."

In the *Shelton* case, cited in the opinion, *supra*, defendant was arrested without a warrant under circumstances held sufficient to justify it, he being a busy bootlegger about to convey a load of liquor to his home, and certain liquor within easy reach and in his immediate control was seized.

In the *Charles* case, cited, *supra*, defendant was lawfully arrested for violation of narcotic laws, and upon a search some liquor was found, some of which was in plain view. The Court in that case attempts, unsuccessfully, to distinguish *United States* v. *Boyd* (D.C., Wash.), 1 Fed.(2d), 1019, which holds exactly the opposite, saying:

"It may be conceded that a narcotic or other Federal officer, who on reasonable grounds institutes a search for drugs, may not take advantage of his presence on the entered premises to make a search for liquor. To hold otherwise would in effect be to qualify Section 25 of Title 2 of the National Prohibition Act by evasion, and to encourage unconstitutional subterfuge."

And comments that "there is very little authority for or against this proposition," citing only one for it, *Milam* v. *United States* (C.C.A. 4th), 296 Fed. 629. The general weight of authority, however, seems to be against the proposition; *U. S.* v. *Kirschenblatt*, *supra*; *U. S.* v. *Poller*, *supra*; *United States* v. *Mills* (D.C., N.Y.), 185 Fed. 318, wherein defendants having been indicted for conspiracy to defraud the United

States of import duties, a warrant for their arrest was issued, under which the marshal seized not only the documents concerning the particular importation, but also all books and papers of defendants' firm covering their business as importers of silks, veilings, laces, etc., and it was:

> "Held: That such seizure was improper, and that the marshal and district attorney would be required to surrender the books and papers so seized, though after examination the district attorney claimed they showed the commission of other offenses which he intended to submit to the grand jury."

United States v. *Brengle* (D.C., Va.), 29 Fed. Supp. 190, a prosecution for violating the white slave traffic act, in which articles and documents seized on a search of premises were suppressed as evidence because not used to commit or carry on the offense charged, wherein the Court discussed the *Marron* and *Lefkowi* cases, *supra*, and says of the *Poller* case, *supra*:

> "Here, it seems to me, the characteristic crisp opinion of Circuit Judge Learned Hand in *United States* v. *Poller* (2d Cr.), 43 Fed. (2d) 911 (decided before the *Lefkowitz* case but after the *Marron* case) is exceedingly helpful. The charge there was 'that Swiss watch movements were being imported in fraud of the customs, manifested as chocolate sweets, and that a case of this sort had been shipped, marked "L.A.B. No. 2".' 43 Fed.(2d) 911. As incident to the lawful arrest of the defendant, the search and seizure were held lawful and reasonable as to documents 'used to commit the offense,' or to carry it on, including papers which bore upon the importation of case 'L.A.B. No. 2,' also described as all those (documents) which were prepared, sent to, or received by Poller, in connection with this very case, 'L.A.B. No. 2,' 43 Fed.(2d) 913. But the Court directed the return of

> all other documents seized, even though these documents might be highly incriminatory as to the defendants and even though they related to similar previous offenses by the defendant, such as 'papers which covered earlier shipments of putative chocolate sweets.' 43 Fed.(2d) 913."

In *United States* v. *Boyd* (D.C., Wash.), 1 Fed.(2d) 1019, a Federal narcotics officer, on detecting the odor of burning opium from defendant's home, was held to have been authorized to search the premises for violation of the Harrison Narcotics Act, only, because his senses gave him probable cause to believe that Act was being violated in his presence, and his seizure of a large quantity of opium was upheld. A large quantity of liquor was also seized, which was made the basis of a separate indictment, and the Court sustained a motion to suppress this liquor as evidence, saying:

> "The seizure of the liquor in the home of the defendant was unlawful."

In *United States* v. *Moore* (D.C., Me.), 4 Fed.(2d) 600, a customs inspector secured a search warrant for intoxicating liquors alleged to have been smuggled into the United States without payment of duties; a search was made and certain liquor was seized, and defendant was indicted for unlawful possession of such liquor under the National Prohibition Act. The Court held the search warrant to have been legally issued under the smuggling statutes, but said:

> "It by no means follows, however, that a search warrant, even when properly issued under the smuggling statute, can be legally used to discover evidence of the commission of the crime of possession of intoxicating liquors.

"It seems a perfectly clear case of a search warrant which was issued for one purpose, i. e., the taking of smuggled goods, being illegally used for a totally different one, i. e., discovery of a violation of a criminal statute, the Volstead Act."

CONCLUSION

The whole matter narrows down to this:

1. These officers, they say, wanted to search Harris' home and car for two $10,000 cancelled checks.

2. They knew they could not secure a *valid* warrant to search for them, because they had no probable cause which they could present to a magistrate as a basis for their "belief" that they were there.

3. So, as a subterfuge, they secured what *purported* to be a valid warrant of arrest, based upon complaint which, while positive in form, likewise had no probable cause for its issuance, else Harris would have been indicted on that very charge thereafter.

4. Then, using this so-called valid warrant of arrest, and having entered his home under it, they proceeded to do that for which they could not have secured a valid search warrant:

Is that "good faith"?

Is that a "reasonable" search?

Were these officers justified in "combing and rummaging" Harris' home under these facts?

We assert:

That a careful analysis of the decisions of the Supreme Court and of every Circuit Court in the nation, sustains the proposition that a thorough search of a man's home can only be upheld by the issuance of a search warrant based upon probable cause supported by oath or affirmation.

That no agent of the Government can substitute his suspicions for the judgment of a magistrate.

That under a warrant of arrest no agent of the Government has any authority to extend his search beyond the person of the defendant and the things which are immediately in the presence of the defendant.

That at that point, no officer or agent of the Government can extend his search through the bathrooms, the kitchens, the bedrooms, under the mattresses, in the closets, through bureau drawers, and into sealed envelopes, under the guise, as in this case, of looking for evidence of two cancelled checks of the Mudge Oil Company.

That such a search, even though it be related to the alleged means by which the crime was committed, might reasonably be expected to be hidden away, and accordingly related to the offense for which the defendant was arrested, cannot be sustained upon that proposition, for the reason that it is a clear invasion of the Constitution and the Amendments thereto.

At the risk of tedious repetition, if the holding of the Circuit Court in this case be the law, then the Court has opened the door of opportunity to every officer and agent

of the Government to by-pass all committing magistrates and all courts, and has impliedly said to these men: "It is not necessary for you to make an affidavit before you get a search warrant to search a man's home; it is not necessary for you to have probable cause to believe that a crime is being committed in a certain home; all you need to do is to get a warrant for his arrest on any pretext you may devise, arm yourself with the warrant for his arrest only, wait until he gets into his home (and, of course he can't be in all the rooms at the same time, but whereever you may catch him), put your handcuffs on him, hold him in that room for five, six or seven hours; make your search in ever niche and crevice of his home, over his objections notwithstanding, as long as the object of your search is reasonably related to the crime for which you have arrested him, and it matters not if you find anything connected with the crime, if you should by chance find anything in that house concealed or hidden away relating to any crime, State or Federal, just bring it on in and the courts will see that he goes to the penitentiary; if he should be so unfortunate as to have in his possession a gallon of corn whiskey which had been given to him for fish bait by one of the boys down in the Kiamichi Mountains, bring it on in even though you find it on the top shelf of his pantry in the kitchen, even though it is unrelated to the unlawful possession of two allegedly stolen Mudge Oil Company checks for which you are holding the man under arrest; if you find a counterfeit bill, in a sealed envelope, which he may have found on the streets that same day, secreted in a sealed en-

velope in the suit which he wore that day, and which was hanging in his locked closet, take the door off the hinge, search the suit, break open the sealed envelope, get the counterfeit bill which was found by the defendant, and we can still put him in the penitentiary, and do this even though it is wholly unrelated to the two stolen Mudge Oil Company checks which you were looking for and did not find, and for which he was not indicted or tried."

We again assert that this cannot be the law in America.

We reiterate that a search in violation of the Constitution is not made lawful by what it brings to light.

We do not disagree with many of the splendid principles of law announced by the Circuit Court of Appeals, which are sustained by the decisions of all the other Circuits and of the Supreme Court.

But the conclusions of the Circuit Court in placing its stamp of approval upon the extent of a search as is done in this case, without a search warrant, is in direct violation of the very principles so announced, and as laid down by the Supreme Court of the United States.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined; and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Tenth Circuit shall be reversed in order that justice may be done to petitioner; and that to such an end a writ of *certiorari*

should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

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